

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD R. HARRIS,

Plaintiff/Counterdefendant-
Appellant/Cross-Appellee,

v

GORDON M. MITCHELL,

Defendant-Appellee,

and

ROBERT L. EMMETT, ROBERT A.
WILLIAMS, and ELAINE MITCHELL,

Defendants-Appellees/Cross-
Appellants,

and

SPAH, INC.,

Defendant/Counterplaintiff-
Appellee/Cross-Appellant.

UNPUBLISHED

May 6, 2003

No. 226404

Wayne Circuit Court

LC No. 98-827750-CK

Before: Zahra, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition. Defendants cross appeal, raising alternative grounds for affirmance and challenging the denial of costs and attorney fees. We affirm.

This dispute arises from membership and activities associated with The Society for the Preservation and Advancement of the Harmonica (SPAH). Plaintiff, a member of SPAH and former editor of the newsletter, alleged breach of contract and other causes of action arising from discontinuing plaintiff's video recording of SPAH events. Plaintiff further alleged that defendants aligned with his ex-wife and conspired against him. The trial court granted defendants' motion for summary disposition, dismissed defendants' countercomplaint without

prejudice at defendants' request to end the litigation, and denied defendants' request for costs and attorney fees as sanctions.

I. Plaintiff's Amended Complaint

A. Breach of Contract¹

Plaintiff alleges that the trial court erred in dismissing his breach of contract claim. We disagree. The existence and interpretation of a contract presents a question of law that is reviewed de novo. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001); *Madison District Public Schools v Myers*, 247 Mich App 583, 591; 637 NW2d 526 (2001). Although plaintiff had negotiated written contracts in the past, plaintiff had not negotiated written contracts for the time in dispute in this litigation. Nonetheless, plaintiff alleged an entitlement to film SPAH events until he recouped the cost of his video equipment. Because it was undisputed that this "contract" did not comport with the requirements of MCL 566.132, see also *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 441; 505 NW2d 275 (1993), the trial court properly granted defendants' motion for summary disposition.²

B. False-Light Invasion of Privacy

Plaintiff alleges that the trial court erred in dismissing the false-light invasion of privacy claim. We disagree. An appellate court reviews the grant or denial of a motion for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The moving party has the initial burden to support its claim to summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate that a genuine issue of disputed fact exists for trial. *Id.* To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id.* Affidavits, depositions, and documentary evidence offered in opposition to a motion shall be considered only to the extent that the content or substance would be admissible as evidence. MCR 2.116(G)(6); *Maiden, supra*. An affidavit consisting of mere conclusory allegations that are devoid of detail are insufficient to demonstrate that there is no genuine issue of material fact for trial. See *Quinto, supra* at 371-372.

A false light-invasion of privacy claim is established if the plaintiff demonstrates information that defendant broadcast to the public in general or to a large number of people, the

¹ We note that the same allegations raised by plaintiff, appearing in propria persona, are utilized to allege different causes of action. We are not bound by plaintiff's "labels" for his claims because it would exalt form over substance. *Johnson v Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). Nonetheless, we have addressed all of the claims raised by plaintiff.

² Plaintiff contends that a genuine issue of material fact regarding the contract claim was presented based on the affidavit of Billie Sheldon. However, the duty to interpret and apply the law is allocated to the courts, not the parties' witnesses. *Hottman v Hottman*, 226 Mich App 171, 179; 572 NW2d 259 (1997). Our conclusion regarding the existence of a valid contract is not impacted by the affidavit. *Id.*; *Madison, supra*.

information was unreasonable and highly objectionable because it attributed characteristics, conduct or beliefs to the plaintiff that were false, and this information placed the plaintiff in a false position. *Porter v Royal Oak*, 214 Mich App 478, 486-487; 542 NW2d 905 (1995). If the contested information is true, the cause of action fails. *Id.* The trial court properly granted summary disposition of this claim because plaintiff failed to present documentary evidence identifying the “other individuals” to whom the information was conveyed and the specific statements that were allegedly made. *Quinto, supra*. Although plaintiff alleged, in conjunction with his motion for injunctive relief, that several articles were published during the litigation that portrayed plaintiff in a false light, the articles contained accurate factual, not editorial, summaries of the status of the litigation and do not give rise to a claim for false-light invasion of privacy. *Porter, supra*.

C. The Derivative Action

The trial court properly granted summary disposition of the derivative action, *Bay Bar Ass’n v Finance System, Inc*, 345 Mich 434, 447; 76 NW2d 23 (1956), and plaintiff’s attempt to bring the action as a “next friend” is without merit. See *Marquette Prison Warden v Meadows*, 114 Mich App 121, 124; 318 NW2d 627 (1982).

D. Tortious Interference with a Contractual Relationship

To establish this cause of action, a plaintiff must establish a contract, the breach thereof, and instigation of the breach, without justification, by the defendant. *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 95-96; 443 NW2d 451 (1989). To satisfy the instigation requirement, the plaintiff must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and without justification, designed to invade the contractual rights of another. *Id.* at 96. Plaintiff failed to establish the elements of this claim, and the trial court properly granted defendants’ motion for summary disposition.

E. Misrepresentation

To maintain a claim for misrepresentation or fraud, a plaintiff must establish: (1) the defendant made a material misrepresentation; (2) it was false; (3) when it was made, the defendant knew it was false or made it recklessly without knowledge of its truth or falsity; (4) the defendant made it with the intent that the plaintiff would act upon it; (5) the plaintiff acted in reliance on it; and (6) the plaintiff suffered damage. *Int’l Brotherhood of Electrical Workers, Local Union No 58 v McNulty*, 214 Mich App 437, 447; 543 NW2d 25 (1995). This action must be predicated on a statement relating to a past or an existing fact. *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997). Future promises are contractual and cannot constitute actionable fraud. *Id.* Fraud will not be presumed and must be proved by the plaintiff with clear, satisfactory, and convincing evidence. *Jim-Bob, supra* at 90. The trial court properly dismissed this claim because plaintiff failed to establish the elements with clear, satisfactory and convincing evidence. *Id.* Rather, plaintiff merely insinuated in the pleadings and in the Sheldon affidavit that inferences arose based on the relationship between SPAH members and his ex-wife. *Quinto, supra*.

F. Breach of Contract, Claim and Delivery, and Conversion

Review of the amended complaint reveals that the allegations with respect to these claims merely arise from the initial breach of contract claim and the tortious interference with contractual relations claim. *Johnson v Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). Specifically, plaintiff alleged an entitlement to videotape SPAH events and market them for profit and interference with this contract.³ Consequently, the trial court properly dismissed plaintiff's complaint in its entirety where plaintiff failed to demonstrate a valid contractual right to the videotapes and any unlawful taking. See MCL 600.2920.

G. Conspiracy

To raise a claim for civil conspiracy, it is necessary to prove a separate, actionable tort. *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986). In light of the dismissal of the tort claims, the trial court properly dismissed the conspiracy claims. *Id.*

II. Third Party Defendant, Discovery, and Premature Disposition

In light of plaintiff's failure to establish the elements of his claims with admissible documentary evidence, the trial court's decision regarding the addition of another defendant and amendment of the complaint was not an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Plaintiff failed to cite supporting authority for his contention that the form of the production of the discovery was a violation of his due process rights, and therefore, we need not address this argument. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). Furthermore, summary disposition is appropriate prior to the close of discovery where no fair chance exists that further discovery will result in factual support for the nonmoving party. *Ireland v Edwards*, 230 Mich App 607, 623; 584 NW2d 632 (1998). Although the discovery period was extended for an additional twenty-one days, plaintiff failed to identify what discovery would have occurred in that period and the proofs he expected to derive. Accordingly, the trial court did not err in granting summary disposition prior to the close of discovery.

III. Dismissal of the Countercomplaint

The trial court did not address the propriety of the continuation of the countercomplaint, and therefore, it is not preserved for appellate review. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). Defense counsel voluntarily agreed to dismiss the countercomplaint after the trial court granted defendants' motion for summary disposition, and the merits were not addressed.

IV. Cross Appeal

We need not address defendants' alternative grounds for affirmance in light of our conclusion that the grant of summary disposition was proper. Defendants' allegation of a denial

³ While plaintiff disagrees with the trial court's characterization that plaintiff sought to extend the contract into perpetuity, nonetheless, the allegations of the complaint indicate a continuing right to videotape SPAH events, albeit through 1998.

of due process regarding a sanctions hearing is without merit. There was ample notice of the nature of the hearing and an opportunity to be heard in a meaningful time and manner. *Klco v Dynamic Training Corp*, 192 Mich App 39, 42; 480 NW2d 596 (1991). Lastly, we cannot conclude that the trial court's ruling under MCL 600.2591(1) was clearly erroneous. *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 266; 548 NW2d 698 (1996).

Affirmed.

/s/ Brian K. Zahra
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood